(3)

No. 90-816

Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR THE PETITIONER

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
A. The Government's Strained Reading Of The Fifth Circuit's *Joslyn* Decision Is Wholly Implausible	2
B. The Decision Below Is Not Based On Traditional Standards Of Corporate Liability	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

Colorado v. *Idarado Mining Co.*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20578 (D. Colo. 1987)	5
Idaho v. *Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986)	5, 6
Joslyn Manufacturing Co. v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), petitions for cert. pending, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973 & 59 U.S.L.W. 3077 (U.S. Aug. 7, 1990) (No. 90-69)	*passim*
New York v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)	5, 6
Riverside Market Development Corp. v. *International Building Products*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 23, 1990)	6
United States v. *Mottolo*, 605 F. Supp. 898 (D.N.H. 1985)	5
Vermont v. *Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988)	5

Miscellaneous:

1 *Fletcher Cyclopedia of the Law of Private Corporations* (1990)	7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-816

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR THE PETITIONER

The government acknowledges (Br. in Opp. 8) that the certiorari petition presents a clean legal issue—whether a parent corporation's control of its subsidiary's operations subjects the parent to liability under CERCLA only when the applicable "piercing the corporate veil" standard is satisfied. The government contended, and the First Circuit held, that CERCLA imposes "direct" liability on a parent corporation even if the corporate veil between parent and subsidiary may not be pierced.

The government nonetheless opposes certiorari on two grounds. First, it tries to disguise the conflict between the decision below and the Fifth Circuit's

decision in the companion case now pending before this Court. But the very text of the two opinions, and the government's own filings in the cases, eliminates any doubt that the decisions squarely conflict. Second, the government tries to support the First Circuit's decision on the merits. In view of the conflict in the lower courts and the importance of the issue, however, those arguments provide no reason for this Court to deny certiorari. Moreover, the government points to nothing in the statute or its legislative history showing that Congress intended the dramatic expansion of shareholder liability effected by the decision below. Review by this Court is clearly warranted.

A. The Government's Strained Reading Of The Fifth Circuit's *Joslyn* Decision Is Wholly Implausible.

We argued in the petition (at 15-17) that certiorari is warranted because the decision below squarely conflicts with the Fifth Circuit's decision in *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), petitions for cert. pending, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973) & 59 U.S.L.W. 3077 (U.S. Aug. 7, 1990) (No. 90-69). We also showed (Pet. 18-19) that the issue presented in the petition will arise in large numbers of cases and has important practical implications for the business community.

The government does not dispute that the issue presented here is an important one. Its contention (Br. in Opp. 12-13) is that certiorari is not warranted because there is no conflict between this case and *Joslyn*. According to the government, Kayser-Roth was held liable " 'for *its* activities as an operator, not the ac-

tivities of a subsidiary,' " (Br. in Opp. 13 (quoting Pet. App. 5a (emphasis in original))); *Joslyn*, the government continues, did not address the theory of liability endorsed by the First Circuit, but held only that parent corporations are not automatically liable for the acts of their subsidiaries. (This position is fleshed out in the Solicitor General's *amicus* brief in *Joslyn* at pages 10-12.) The government's desire to minimize the scope of its loss is understandable, but *Joslyn* plainly rejected the very legal rule adopted by the court below.

At the outset, despite the government's hints to the contrary (Br. in Opp. 10), the courts below did not hold Kayser-Roth liable for the direct acts of its employees. Instead, they premised liability on the finding that " 'Kayser-Roth . . . exerted practical total influence and control over Stamina Mills' operations.' " Pet. App. 6a (citation omitted). In particular, the court of appeals noted that Kayser-Roth's "control included environmental matters," pointing to the district court's finding that Kayser-Roth " 'had the power to control,' " " 'the power to direct,' " " 'the ultimate ability to prevent,' " and " ' was able to direct' " various Stamina Mills activities. *Ibid.* (citation omitted). The court of appeals found "[s]uch control" sufficient to establish CERCLA liability. *Id.* at 7a.

In *Joslyn*, the Fifth Circuit flatly rejected this approach. To begin with, the government properly acknowledges (Br. in Opp. 13) that the Fifth Circuit was presented with the contention that a parent corporation's control over its subsidiary's operations may support liability, but the government erroneously asserts that this argument appeared only in the government's *amicus* brief. The party supported by the

government—Joslyn Manufacturing Company—also contended that the defendant should be held directly liable under CERCLA because it controlled the operations of its subsidiary. See Joslyn Mfg. Co. C.A. Reply Br. 19-20. Indeed, Joslyn took pains to demonstrate that its position was "fully consistent" with the one put forth by the government. *Id.* at 19. See also Powerline Supply Co. C.A. Reply Br. 7 (arguing that the defendant was liable because of its "direct" involvement in its subsidiary's activities).

The language of the Fifth Circuit's decision establishes beyond any doubt that the court considered and rejected the government's position. The court made clear that CERCLA does not make "controlling entities liable for the acts of valid corporations." 893 F.2d at 83. To the contrary, the court flatly held that, in a CERCLA suit, the "criteria for analyzing the issue of 'control' in the parent/subsidiary context" are those that govern piercing the corporate veil. *Ibid.* Certainly, after pressing its "control test"—and having it rejected—it ill behooves the government now to contend that the question of that test's validity was not properly before the court in *Joslyn*.

Moreover, the *Joslyn* opinion contains additional indisputable evidence of the broad scope of the ruling. At the outset of its opinion, the Fifth Circuit cited a number of decisions and explicitly "decline[d] to" follow them. *Ibid.* *Not one* of those cases involved the narrow issue that the government now contends is all that was decided in *Joslyn*—whether a subsidiary's liability should automatically be imputed to its parent corporation. Rather, these cases *all* appear in the government's *amicus* brief, cited in support of the theory of "direct" parent liability that is at issue here; most of the decisions squarely adopt

that legal standard. Indeed, several of these same cases were expressly endorsed by the First Circuit in the decision below (see Pet. App. 4a).

For example, the Fifth Circuit refused to follow *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), a decision extensively relied on by the government in its *amicus* brief in *Joslyn* (see C.A. Am. Br. 16, 17, 21, 22), its brief in the First Circuit in this case (C.A. Br. 22-24), and its brief in opposition in this Court (at 10 n.6, 14). Similarly, the district court decisions expressly rejected by the Fifth Circuit—*Idaho* v. *Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *Colorado* v. *Idarado Mining Co.*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20578 (D. Colo. 1987); and *Vermont* v. *Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988); were prominently featured in the government's *amicus* brief before that court. Am. Br. 21-22; see also *id.* at 19 n.11 (citing *United States* v. *Mottolo*, 605 F. Supp. 898 (D.N.H. 1985), another decision rejected by the Fifth Circuit).

In sum, it would be difficult to draft a more express rejection of the government's theory.[1] The Fifth

[1] The Solicitor General argues in the *amicus* brief filed in this Court in *Joslyn* that the Fifth Circuit did not reject the standard of liability set forth in these decisions, but merely found that principle inapplicable on the facts of the case. No. 89-1973 Am. Br. at 11-12. That assertion is, to say the least, strained. As we have discussed, we read *Joslyn* expressly to reject the government's contention. Moreover, if the Fifth Circuit had meant to leave the legal question open for another day, it surely would have said so rather than couching its decision in terms that foreclose the issue. Finally, the Solicitor General's conclusion rests on a clear misreading of the district court's opinion in *Joslyn*. The district court rejected the legal standard that the government advocated

Circuit examined the decisions that the government advanced in support of its theory of liability and expressly disagreed with the result in those cases. The First Circuit, by contrast, expressly endorsed those very same decisions. Pet. App. 4a (citing *Shore Realty* and *Bunker Hill*). The decision in *Joslyn* thus squarely conflicts with the First Circuit's decision in this case.[2]

B. The Decision Below Is Not Based On Traditional Standards Of Corporate Liability.

Much of the government's discussion of the merits (Br. in Opp. 8-12) is irrelevant. For example, the government seeks to justify the decision below by

---

in the court of appeals. 696 F. Supp. at 224-226. Later in its opinion, the district court reaffirmed that determination, noting that, if the facts of the case had been different, liability might attach under *common law* principles. See *id.* at 232-233 n.20. Significantly, the government's brief before the Fifth Circuit in *Joslyn* forthrightly acknowledged the district court's determination, stating that "[t]he district court in the instant case has apparently rejected this theory of direct liability, because the court viewed it as significantly reducing the protection that parent corporations otherwise are accorded by the doctrine of the corporate veil." Am. Br. at 22 (citing 696 F. Supp. at 224 & n.4).

[2] The government persists (Br. in Opp. 13 n.11) in misconstruing the decision in *Riverside Market Development Corp.* v. *International Building Products*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 23, 1990). The passage cited by the government is expressly addressed to the liability of corporate *officers*, not the liability of shareholders. Slip op. at *11; see also Pet. 17 n.12. The government has simply inserted the term "a shareholder" into a sentence discussing the defendant's liability as an officer. As we explain in the petition (at 14-15) the two situations involve completely different legal principles.

reference to the facts, arguing that Kayser-Roth may be held liable because "it participated in and ultimately made all important 'operational decisions.'" Br. in Opp. 10. But the petition does not seek review of the lower courts' factual findings regarding the extent of Kayser-Roth's involvement in the affairs of its subsidiary. Rather, the question is the legal standard against which those facts are to be measured; specifically, whether Congress intended to impose liability on parent corporations that "control" their subsidiaries' operations without regard to whether the corporate veil between parent and subsidiary may be pierced.

The remainder of government's argument rests on another fallacy: the contention that Kayser-Roth was held liable for its own acts, not for the acts of its subsidiary, Stamina Mills. Kayser-Roth did not itself operate the facility. Instead, as we explain above, it was held liable because it was found to *control* Stamina Mills' operation of the facility. See Pet. App. 5a-6a.

Numerous decisions establish that the piercing the corporate veil doctrine addresses the precise question presented in this case: when does the parent's control of its subsidiary's affairs reach the point that the parent and the subsidiary should be treated as one. See generally 1 *Fletcher Cyclopedia of the Law of Private Corporations* §§ 25, 43 (1990). Under the court of appeals' approach, veil-piercing would not be necessary in any context because it always would be possible to hold a parent that exercises control over a subsidiary "directly" liable for the parent's "own" acts. In fact, however, veil-piercing rules are applied universally to determine whether a parent should be

held liable due to its control over a subsidiary. As we discuss in the petition (at 8-15), Congress plainly did not intend to overturn that well-settled limit on shareholder liability.[3]

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

February 1, 1991

---

[3] The government half-heartedly puts forth (Br. in Opp. 10-11 n.7) an alternate reading of the statutory language. But the Fifth Circuit declined to read the statute in the manner suggested by the government. Moreover, the government's argument fails to come to grips with the settled rule, also applied by the Fifth Circuit in *Joslyn*, that such a dramatic expansion in shareholder liability must rest on express statutory language.